



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

FAMILY DIVISION

CIVIL CASE NO. 5 OF 2001

JAG.....PLAINTIFF

VERSUS

JMO.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 4th June 2001. The same was amended on 16th of June, 2004.

In the Amended Plaint the Plaintiff stated that she started cohabiting with the Respondent as husband and wife in December 1984 and from the union had three children born; on 30th October 1985, 26th July 1988 and 2nd July 1982. The parties during the subsistence of the marriage cohabited in Buru Buru and Langata in Nairobi.

2. The plaintiff cited cruelty as her main ground for seeking for the divorce. The particulars included; -

i. Solely financing of needs of the family and acquisition of both movable and immovable properties whilst the defendant was reckless and wasteful with finances

ii. She suffered loss and mental anguish as

-The Defendant acquired and misused a loan against her property L.R. No. NRB/Block [xxxx], Green Garden which compelled the Plaintiff to sell the same in order to pay off the loan.

-The defendant misused Kshs.1,600,000/= for his own use in or about 1996 which sum was intended for business.

-The defendant sold maize harvested from Title Number [xxxx] Kimini in Transzoia and converted the proceeds of sale and a further Kshs.500,000/- meant for development of the farm for his own use.

-once again, the defendant converted to his use in July 1992 Kshs.250,000/- meant for construction of the Langata property.

- The defendant opened the family house to all manner of people to the detriment of the family.

-The Defendant practiced witch craft;

- The defendant was a man of ungoverned temper

-The defendant threatened the Plaintiff and in a fit of anger on 6th May 2010 destroyed the Plaintiff's office.

3. The Plaintiff contended further stated that the cohabitation between the two was predicated upon existence of a common law marriage in the alternative the cohabitation did not amount to a marriage.

4. The Plaintiff sought for order that;

a) There be presumption of marriage from cohabitation.

b) Dissolution of the said marriage;

c) In the alternative a declaration that no marriage was contracted between the parties.

d) An order to evict the Defendant from Property L.R. No. Nairobi/Block [xxxx].

e) An order restraining the Defendant by himself, his agents, servants or whomsoever from occupying, interfering, alienating or in any manner dealing with the Plaintiff's residential property i.e. L.R. No. NRB/Block [xxxx].

f) Compensate for the assets that the Defendant had sold and/or wasted and/or canibalized

g) Costs of the suit.

5. On his part the Defendant filed a defence and a Counterclaim dated 22nd June 2001, wherein the Defendant denied the original jurisdiction of the court to hear the matter, stated that the plaint is bad in law and ought to be struck. Further in the alternative the defendant claimed that there existed a suit in the Kiambu Court touching on the same issues. Further the defendant denied the allegations levelled against him as being untrue including the allegations that the Plaintiff financed solely the purchase of properties, failure of the defendant to discharge his obligations as a married man and husband. Including misuse of funds as alleged.

6. The Defendant contended that upon marrying the Plaintiff he took her to his home in Buru Buru before they jointly developed the Langata home. Further the home in Langata was charged and a loan obtained so that the Plaintiff would pay off her clients. That upon sale of NRB/Block [xxxx] each received 1,200,000/=. The defendant use part of his share, Kshs. 1,000,000/= towards the construction of for the Langata home. He denied allegations that he practised witchcraft and stated further that the Plaintiff deserted the matrimonial home on her own.

7. Further it was the Defendant's contention that the parties contracted their marriage under Luhya customary law and that the Plaintiff's grounds do not disclose any grounds for divorce under the said customs and therefore the Plaintiff ought to be dismissed.

8. In the counter claim the defendant contended that he set up the Plaintiff's private practice, financed the same, assisted the plaintiff in obtaining clients and that by their joint efforts the two acquired L.R. No. [xxxx], L.R. Nairobi [xxxx] and L.R. No. [xxxx].

9. He accused the Plaintiff of committing acts of fraud by drawing and causing to transfer L.R. No. [xxxx] to herself without his knowledge and consent and defrauding him of his equal share in the same.

10. He further alleged adultery on the part of the plaintiff with named and un

11. The Defendant prayed for:

i. Dismissal of the plaint,

ii. Declaration that the Plaintiff owns L.R. No. [xxxx] for his benefit and that he owns half share of the same.

iii. Costs.

12. The case was fixed for hearing by consent of parties for 17th of January 2019. On the said day neither the defendant nor counsel on record were present.

13. The plaintiff then acting in person was present and ready to proceed to give time to the defence the matter was deferred to 11.25 a.m by which time none of the defence team appeared and the matter proceeded ex parte their absence notwithstanding. The court also took account of the age of the matter which was filed 18 years

14. At the hearing the plaintiff adopted her statement filed on the 2nd of May 2013 and her pleadings on record. In her testimony she informed the court that the parties had stayed apart for 19 years. They had irreconcilable differences and the marriage could not work and that it is highly unlikely that there would be any reconciliation.

15. The plaintiff sought for prayers a, b, & f of the amended plaint, and informed the court the other prayers had been taken over by event.

16. Having heard the plaintiffs evidence and considered the pleadings on record including the defence I am of the view that the plaintiff proved her case on a balance of probabilities. It is evident from the evidence of the Plaintiff that the Defendant was guilty of cruelty as pleaded and testified. I am further persuaded that the marriage between the two has irretrievably broken down.

17. Consequently, judgment is entered in favour of the plaintiff in terms of prayers a, b, & f of the amended plaint.

18. The counter claim is dismissed with costs.

Dated and Delivered in Nairobi this 28th day of February, 2019

ALI-ARONI

JUDGE